Amendments to
Secs. 2, 3, and 11
Order 5-89
Title 8 California Code of Regulations 11050
**Effective August 21, 1993**

Amendments to Sections 2, 3, and 11 of
INDUSTRIAL WELFARE COMMISSION ORDER NO. 5-89
REGULATING
**PUBLIC HOUSEKEEPING INDUSTRY**

These changes affect only the health care industry

**OFFICIAL NOTICE**

To employers and representatives of persons in occupations covered by IWC Order No. 5-89 who work in the **h**

The Industrial Welfare Commission (IWC) Of the State of California proceeded according its authority in the La Constitution of California, and concluded that Sections 2, 3, and 11 of its Order 5-89, regulating the Public Hous should be amended to affect persons who work in the health care industry. The IWC promulgated these amendm pursuant to the special provisions of Labor Code Section 1182.7, on June 29, 1993. The amendments become ef 1993. The amendments become effective on August 21, 1993.

All other provisions of Section 2, Definitions, Section 3, Hours and Days of Work, and Section 11, Meal Period of Order 5-89 remain in full force and effect.

The amendments allow more flexibility with respect to work scheduling, managerial and administrative exempti hours worked for compensation. They apply only to persons covered by this order who work in the health care i but is not limited to, all employees who work for hospitals, skilled nursing facilities, intermediate care and resid convalescent care institutions, and similar establishments.

The amendments printed in this mailer must be posted next to the calendar-style poster on which the entire Orde which should already be posted where employees can read it.

The reasons for the changes accompany the amendments in the Statement as to the Basis, provided for you infor questions on interpreting the amendments or how they apply to you, please contact your nearest Division of Lab Enforcement office, list below. If you need additional copies of this amendment, please write to:

**Division of Labor Standards Enforcement,**
**P. O. Box 420603**
**San Francisco, CA 94142-0603**

**2. DEFINITIONS**

(The following language is added to Section 2, *Definitions*, subsection (H).)

(The following language replaces subsection (K) in Section 3, *Hours and Days of Work*.)

K. Employees in the health care

(7) For purpose affected employ employees in a unit, such as a d job classificatio

(H)…Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(The following language is added to Section 2, *Definitions*, subsection (L).)

(L)…Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and /or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

**3. HOURS AND DAYS OF WORK**

(The following language replaces subsection (C) in Section 3, *Hours and Days of Work*.)

(C) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated any provision of this Section if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of fourteen (14) consecutive days is accepted in lieu of the workweek of seven consecutive days for purpose of overtime computation and if, for any employment in excess of eight (8) hours in any workday and in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate not less than one and one-half (1 ½) times the regular rate at which the employee is employed., provided:

industry may work on any days any number of hours a day up to twelve (12) without overtime, as long as the employer and at least two-thirds (2/3) of the affected employees in a work nit agree to this flexible work arrangement, in writing, in a secret ballot election before the performance of work, provided:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of twelve (12);

(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) in the workweek;

(3) Prior to the secret ballot vote, any employer who proposes to institute a flexible work arrangement shall make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the flexible work arrangement. Failure to comply with this section shall make the election null and void;

(4) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(5) Any employer who institutes an arrangement pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the secret ballot election and is unable or unwilling

physical locatio
subdivision of a
work unit may c
employee as lon
identifiable wor
are met.

(The following i
*Hours and Days*
(L).)

(L) When an em
industry request
employer concu
permitted to ma
result of persona
amount of make
two (2) hours in
where applicabl
one fourteen (14
must be made u
or work period,
With the except
authorized in thi
appropriate over
Section 3 shall a
daily or weekly
workweek or fo
period.

**11. MEAL PE**

(The following i
*Meal Periods*, a

(C) Notwithstan
of this order, em
care industry wh
of eight (8) total
voluntarily waiv
period. In order
waiver must be
agreement that i
both the employ
The employee n
any time by pro
least one day's v
employee shall
all working time
job meal period,

| | | |
|---|---|---|
| (1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rage of pay for all hours in excess of twelve (12);<br><br>(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) hours in a workweek; | to comply with the agreement. An employer shall not be required to offer an alternative work assignment to an employee if an alternative assignment is not available or if the employee was hired after the adoption of the flexible work arrangement. There is no maximum number of employees whom an employer may voluntarily accommodate consistent with its desire and ability to do so;<br><br>(6) After a lapse of twelve (12) months and upon petition of a majority of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the arrangement above. If the arrangement is revoked, the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of time for compliance; | in effect.<br><br>Amendments ad<br>on June 29, 199<br>August 21, 199<br><br>**INDUSTRIAL<br>COMMISSIO<br>CALIFORNIA**<br><br>Lynnel Pollack,<br>James rude<br>Robert Hanna<br>Donald Novey<br>Dorothy Vuksic |

**Statement as to the Basis of Amendments to Sections 2, 3, and 11 of Industrial Welfare Commission Order No. 5-89**

| | | |
|---|---|---|
| Labor Code Sec. 1182.7 requires Industrial Welfare Commission (IWC) to provide accelerated review of petitions filed by organizations recognized in the health care industry who request amendments to an IWC order directly affecting only the health care industry. Under this authority, the California Association of Hospitals and Health Systems (CAHHS) petitioned the IWC to amend and/or clarify certain sections of Order 5, solely for employers and employees in the health care industry. The IWC accepted the petition which proposed to redefine "primarily" and 'hours worked" to parallel federal law in Section 2, *Definitions;* to clarify and expand regulations regarding flexible schedules and overtime in Section 3, *Hours and Days of Work*; and to permit employees to waive meal periods in Section 11, *Meal Periods*. The IWC held three public hearings on its proposals in April 1993.<br><br>After deliberating on all the evidence presented with | being devoted to exempt duties. On June 29, 1993, the IWC adopted language consistent with the FLSA, which promoted clarity and compliance while providing needed flexibility to allow exempt executive and administrative employees to perform nonexempt duties without losing their exempt status. In response to public comment suggesting the term "other pertinent factors" was unclear and confusing to employees, the IWC clarified the meaning of that item by listing some, but not all, examples of pertinent factors.<br><br>**HOURS AND DAYS OF WORK**<br><br>With respect to the petitioner's request to amend Order 5 so that the IWC's standard for a 14-day work period conformed with federal law, the IWC was advised that | hours a da<br>protective<br>language a<br>arrangeme<br>and emplo<br>and weekl<br>flexibility,<br>limited to<br>work over<br>basis, as lo<br>premium v<br>work after<br>day, or in<br>overtime,<br>workweek<br>language c<br>meeting re<br>need be he<br>than one n<br>The IWC i<br>overtime s |

respect to its proposals, the IWC adopted amendments to Order 5 for the health care industry on June 29, 1993, and offers the following statement as to the basis for its actions:

**DEFINITIONS**

Testimony suggested the current DLSE interpretations of "hours worked" were "unduly narrow" resulting in "substantial confusion and serious technical problems," and consistency with the Fair Labor Standards Act (FLSA) would eliminate this confusion. In response to testimony presented at the public hearings that the reference to "29 CFR Part 785" was unclear, the IWC amended that language and referred to "the Fair Labor Standards Act" instead, a term more easily understood by the public. On June 29, 1993, the IWC adopted language to assure "hours worked" in the health care industry would be interpreted in accordance with the FSLA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention that issues related to working time will be resolved consistently under state and federal law.

With respect to redefining "primarily" for the health care industry, the IWC decided since it had examined the professional component of the administrative/executive/professional exemption and adopted language to exempt learned and artistic professions as recently as 1989, it was time to respond to demands for a more flexible application of the executive/ administrative exemption than the rigid 51 percent rule. Employees testified current regulations sometimes resulted in treating an employee as nonexempt under a rigid application of a 51 percent rule, such as where emergency or other conditions resulted in less than 51 percent of the time while such work periods are ordinarily implemented on a departmental-wide or institutional-wide basis, DLSE's interpretation of the current regulation would allow one employee "to destroy the validity of such an arrangement by individually insisting of a seven day workweek standard." Public testimony in favor of the proposal claimed it set a "reasonable standard" one similar to the FLSA. Other arguments suggested a change was necessary to prevent individual employees from "opting in and out" of 14-day work periods because such activity could prove disruptive to established arrangements. Those opposed to the IWC's proposal objected to deleting language referring to a "written agreement or understanding voluntarily arrived at" from the current regulation, protections not found in the FLSA. On June 29, 1993, the IWC adopted its original proposal regarding the 14-day work period because it provided for a more stable working environment by clarifying how 14-day work periods would be consistently calculated and because it confirmed the IWC's intention that the California standard parallels the federal standard. Finally, the WIC stated its intent that flexible work arrangements, such as allowing employees to work up to 12 hours a day without overtime, and 14-day work periods, were mutually exclusive of one another and thus cannot be used simultaneously for the same employees.

Testimony supported the petitioner's claims that DLSE's interpretations regarding the flexible scheduling rules adopted in 1986 and 1988 limited desirable options for employees and frustrated the IWC's intent of more, not less, flexibility. Many at a "reduced rate of pay," with overtime after eight hours a day. Although this practice is permissible, it sometimes adversely affected their benefits and pensions-in order to cope with DLSE's overly "restrictive" policies.

all employ
regardless
time, on-c
permanent
The new r
any arrang
implement
effective d

With respe
employees
industry to
lost as a re
obligation
and eventu
petitioner'
The IWC a
reasonable
needs of e
employers
language p
an as need
requiring a
term sched

**MEAL PE**

The petitio
IWC to all
health care
sifts in exc
hours in a
their right
or meal pe
certain pro
were met.
employees
hearings s
proposal w
waiver, bu
waiving "a
"one" mea
meal perio
one meal p
employees
combined
at least on
long shift,
IWC adop
permits en

| | | |
|---|---|---|
| | Other employees said they preferred to "mix days off" and working the same days each week was an "unrealistic" practice. The revised language clarifies the IWC's original intent to maximize flexibility in scheduling so that the days and hours of work can vary. While some employees argued part-time employees who have flexible work arrangements should be paid premium wages when asked to work beyond their normal part-time arrangements, by the end of the public hearings, most employees agreed requiring premium wages for part-time or temporary employees who work less than 12 hours a day or 40 hours a week is unfair to full-time workers in the same work unit who earn straight time pay for the same daily and weekly hours. While a few employees suggested the "secret ballot election process" allowed under the IWC orders was "flawed" due to "lack of oversight," the Labor Commissioner testified DLSE had received few, if any, complaints regarding the election process.<br><br>After evaluating all the evidence, on June 29, 1993, the<br><br>IWC adopted its proposal to amend flexible scheduling rules<br><br>so that an individual employee in the healthcare industry could agree with his or her employer to<br><br>work on any days any number of | second me<br>waiver is<br>written ag<br>signed by<br>and the en<br>waiver is<br>employee<br>providing<br>one day's<br><br>**INDUS<br>C** |